Supreme Court, U.S.
FILED
932027 JUN - 1 1994

No. 93-

IN THE
Supreme Court of the United States

October Term, 1993

DYLE LINN AND SHIRLEY LINN,
Petitioners,

v.

ARNOLD V. PITTS AND CATHERINE L. PITTS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

MICHAEL HENDERSON, P.C.
354 N.E. Greenwood, Suite 100
Bend, OR 97701
(503) 382-2925
(800) 201-2925

Craig K. Edwards*
943 N.W. Harriman Street
Bend, OR 97701
(503) 383-5046
*Attorney of Record for Petitioners

eBCD Legal Printers, Seattle, WA

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oregon "Right to Farm Law", generally or as applied to Petitioners, is a "taking" under the fifth and fourteenth amendments of the United States Constitution, entitling Petitioners to just compensation.

2. Whether the Oregon "Right to Farm Law", generally or as applied to Petitioners, denies Petitioners equal protection of the laws, thereby violating the Fourteenth Amendment of the United States Constitution.

LIST OF ALL PARTIES

Petitioners: Dyle Linn and Shirley Linn

Represented by:

CRAIG K. EDWARDS
943 N.W. Harriman Street
Bend, Oregon 97701
(503) 383-5046

Respondents: Arnold L. Pitts and Catherine L. Pitts

Represented by:

THOMAS M. ARMOSINO
Cowling & Heysell
717 Murphy Road
Medford, Oregon 97504
(503) 779-8900

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . 1

LIST OF ALL PARTIES 2

TABLE OF AUTHORITIES 4

OFFICIAL REPORT OF CASE 5

STATEMENT OF JURISDICTION 6

CONSTITUTIONAL PROVISIONS AND STATUTES 8

STATEMENT OF THE CASE 11

ARGUMENT FOR ALLOWANCE OF WRIT . . . 14

APPENDICES 23

Appendix A, Transcript of Trial, page 150 . . . . . A-1

Appendix B, Judgment of Trial Court. . B-1

Appendix C, Court of Appeals Decision C-1

Appendix D, Appellate Judgment D-1

Appendix E, Oregon Supreme Court Decision. E-1

Appendix F, ORS 30.930-30.947 . . . . F-1

TABLE OF AUTHORITIES

*ORS 30.947 10

28 USC 1257 . . . . . 7, 9

Constitution of the United States . 6, 12, 21

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 16

Fifth Amendment 8, 14, 19, 21

Fourteenth Amendment . . . 9, 15, 20, 21

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 15

L. Tribe, American Constitutional Law 605 (1988, 2d ed.) 20

Linn v. Pitts, 123 Or App 277, at page 1 (1993) 14

Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 (1992) . 17, 18

New York Central R.R. Co. v. White, 243 U.S. 188 (1917) 16

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 19

Oregon Right to Farm Law 10, 12-15, 19-21

ORS 30.930 . . . . . 10, 12

ORS 30.947 12

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 19

OFFICIAL REPORT OF CASE

In the Circuit Court of the State of Oregon for Josephine County, Civil Case No. 90-CV-0235; Dyle and Shirley Linn, Plaintiff, vs. Arnold L. Pitts and Catherine L. Pitts, Defendants (Appendix B)

In the Court of Appeals of the State of Oregon, CA No. A72501; Dyle Linn and Shirley Linn, Plaintiff-Appellant, vs. Arnold L. Pitts and Catherine L. Pitts, Defendant-Respondent (Appendix C and Appendix D)

In the Supreme Court of the State of Oregon, CA No. A72501; Dyle Linn and Shirley Linn, Petitioners on Review, vs. Arnold A. Pitts and Catherine L. Pitts, Respondents on Review (Appendix E)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is predicated on that the Oregon Supreme Court, on 1 February 1994 denied Petitioners' Motion for Review of the Court of Appeals decision in this case, which let stand the trial court's judgment that Oregon's "Right to Farm Act", ORS 30.930 to 30.947, does not violate the United States Constitution and decisions of this Court. There was not any order respecting a rehearing. There was an order entered April 23, 1994, extending the time for mailing the petition for writ of certiorari to 1 June 1994.

Further, the Oregon Supreme Court, by its action has decided important questions of federal law which have not been decided by this Court, and may in fact conflict with applicable decisions of this Court, as to the constitutionality of a state statute, which is in conflict with the Constitution of the United States, and

thus jurisdiction for this Honorable Court is established as based on 28 USC 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC 1257: State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by

the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

ORS 30.930-30.947 (Oregon Right to Farm Law) (See Appendix A)

STATEMENT OF THE CASE

This petition for Writ of Certiorari arises out of an action in nuisance and trespass brought by the petitioners against the respondents.

Petitioners Dyle and Shirley Linn have lived on Jump Off Joe Creek Road in Josephine County, Oregon, for forty-three years. In the mid 1980s, respondents Arnold and Catherine Pitts began a veal operation on the adjoining property. The waste from the veal operation is disbursed over respondents land with the use of a manure gun which sprays the feces and urine in a fine aerial mist. Because of the proximity of the two parcels and the funnel-like nature of the topography, the spray from respondents' manure gun has drifted over petitioners' property causing illness to the petitioners and damage to trees and other vegetation on petitioners' property. Prior to filing the complaint in this case Petitioners sought relief

from every conceivable source, both state and federal.

Petitioners brought an action in nuisance and trespass against respondents in the Circuit Court of the State of Oregon for Josephine County. At the end of Petitioners' case in chief, upon Respondents' motion for directed verdict, the Circuit Judge dismissed both claims on the basis of the Oregon Right to Farm Law (ORS 30.930 to 30.947) which was enacted in 1981. Petitioners resisted the motion because the Right to Farm Law violated the Constitution of the United States as herein specified, as well as other grounds. The trial judge dismissed Petitioners' constitutional arguments, stating at page 150 of the trial transcript, "I think Mr. Henderson, if you are going to make your constitutional arguments, you are going to need to make those to the appellate courts, because I think clients do have access to the

courts, and there simply has been a lack of proof of I think the kind of exceptions, and I think the evidence upholds the constitutionality of the statute." The Right to Farm Law immunizes farmers engaged in customary farming practices from common law nuisance liability, except where the farmer has been negligent or under two other circumstances not relevant to this proceeding. There was not any allegation or proof that the Respondents were negligent in the operation of the veal farm.

On appeal to the Court of Appeals of the State of Oregon, Petitioners argued that the Oregon Right to Farm Law unconstitutionally deprived them of common law remedies necessary to the protection and preservation of their property rights. The Court of Appeals rejected Petitioners' constitutional arguments without discussion, but, noting they were properly

preserved in the trial court, stating, "However, the record indicates that the court in fact ruled on the constitutional issues, and also advised plaintiffs' counsel that he would have to make the constitutional arguments to the appellate court. Under the circumstances, we reach the merits of plaintiffs' constitutional arguments, but reject them without discussion." Linn v. Pitts, 123 Or App 277, at page 1 (1993). A petition for review in the Supreme Court of the State of Oregon was denied. Linn v. Pitts, 318 Or 350 (1994).

ARGUMENT FOR ALLOWANCE OF WRIT

Petitioners' petition for hearing in this Court is based upon three interrelated constitutional provisions which are infringed by Oregon's Right to Farm Law. The takings clause of the Fifth Amendment, which applies to the states pursuant to the due process clause of the

Fourteenth Amendment, requires just compensation when private property is taken for a public use. The Fourteenth Amendment also guarantees to citizens the equal protection of the laws.

The petitioner does not challenge that the State of Oregon had a legitimate public purpose for the adoption of the Right to Farm Law. However, the existence of a constitutional purpose does not relieve the State of its constitutional responsibility to compensate when private property has been taken. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). The central issue under the takings clause is whether Petitioners' property has been taken as a result of the enactment of the Oregon Right to Farm Law.

The Oregon Right to Farm Law is not unique in its alteration or elimination of common law remedies. It is different, however, from other such legislative adjustments to the common law in that it

does not provide Petitioners with an alternate or substitute remedy. For example workers compensation laws, which have substituted statutory remedies for extinquished tort remedies, are constitutional. New York Central R.R. Co. v. White, 243 U.S. 188 (1917). Whether or not a state legislature is constitutionally required to provide a substitute remedy when a common law cause of action is limited has never been resolved by the United States Supreme Court. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). However, where a common law remedy is critical to the enforcement of constitutionally protected property rights, and where property is acquired and held with the reasonable expectation that the common law remedy is available, the elimination or alternation of that remedy is a clear infringement on the property rights of the property owner.

Nuisance law has long been an essential aspect of the bundle of rights that constitutes private property. Nuisance serves to define the relative rights of adjacent property owners whose activities have an impact across property boundaries. State legislatures may regulate to achieve the same purposes traditionally served by nuisance law, but where state legislation alters the rights of property owners by granting immunities to neighbors, such regulations violate the takings clause and require just compensation.

The importance of nuisance law to the definition of property rights was recognized by the Supreme Court in the recent case of Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 (1992). In Lucas the Court remanded a takings case to the South Carolina Supreme Court for determination of the extent to which a South Carolina statute altered the

property rights of the petitioner. The Court specifically instructed that nuisance law would be part of the background rights to be examined by the state court's decision on remand.

In Lucas, nuisance law was important to determining the limits of the petitioner's property rights. There would be no taking of private property if the state's regulation prohibited the petitioner from doing what was already prohibited by the law of nuisance. But nuisance law also serves to define the reach of a property owner's rights. When the state immunizes actions which were previously a source of liability under nuisance law, the state has to that extent taken rights from property owners who would have had a cause of action.

In the instant case, the Petitioners' had a right to pursue common law cause of action in nuisance consistent with the existing law of the State of Oregon at the

time they acquired the property. The Right to Farm Law eliminated that cause of action by immunizing the certain farming activities of the Petitioners' neighbors. This is a clear change in the property rights of the Petitioners without just compensation.

The Fifth Amendment requires compensation whenever a person's property is taken. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). A taking exists whenever there has been a physical invasion or occupation of private property, Nollan v. California Coastal Commission, 483 U.S. 825 (1987). Oregon's Right to Farm Law as applied to the facts of this case permit the permanent physical occupation of Petitioners' land by waste from the Respondents' land. Prior to the enactment of the Right to Farm Law, Petitioners would have been able to bring a nuisance action in Oregon Court to protect their property rights. Under opinions below,

Petitioners are denied the opportunity to assert their property rights even while their land is physically occupied by pollution from the Respondents' activities.

A central purpose of the takings clause, like the equal protection clause of the Fourteenth Amendment, is to assure that the costs of providing broad, public benefits are not borne by only a few citizens. "[T]he just compensation requirement appears to express a limit on government's power to isolate particular individuals for sacrifice to the general good." L. Tribe, American Constitutional Law 605 (1988, 2d ed.). Under the Oregon Right to Farm Law, individuals who suffer harm from nuisances created by farmers are required to bear the full cost of those nuisances while farmers benefit from significant limitations on the liabilities which they had under the common law. Both the purpose of the takings clause and the

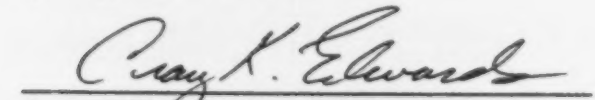
express language of the equal protection clause require the Right to Farm Law to be declared unconstitutional.

The Court should grant the writ and declare the Oregon Right to Farm Law unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. This case should be remanded to the Oregon Courts for a determination of the background rights of the Petitioners under Oregon nuisance law. To the extent that those background rights have been violated by the Oregon Right to Farm Law, the Petitioners should be compensated for the losses they have suffered during the duration of the

nuisance created by the Respondents' activities.

DATED: May 27, 1994

Respectfully submitted,
MICHAEL HENDERSON, P.C.
354 N.E. Greenwood
Suite 100
Bend, OR 97701
(503) 382-2925
(800) 201-2925



By: Craig K. Edwards
943 N.W. Harriman
Bend, OR 97701
(503) 383-5046
Attorney of Record
for Petitioners
Dyle Linn and Shirley
Linn

APPENDICES

APPENDIX A

Transcript of Trial Court, Page 150

those have been proved. We rely on the statute and ask the Court to direct a verdict in our favor.

THE COURT: The legislature has specifically stated and has been cited here in 30.930 through 30.947, it is specifically stated that insofar as a nuisance is concerned as a form of action or form of remedy for the parties, it is not to be a remedy where we're talking about a farm practice except in the limited circumstance as has been pointed out here, that there must be proof of negligent operation or that there have been the raising of infested or infected livestock or crops. There is simply no proof before the court of either one of those exceptions at this time.

I think, Mr. Henderson, if you are going to make your constitutional

courts, and there simply has been a lack of proof of I think the kind of excepticns, and I think the evidence upholds the constitutionality of the statute.

So the Court will grant the motion as far as the nuisance claim is concerned.

MR. MOORE: Your Honor, I would like to move on to the trespass claim. While they have testified that water mist got on to their property and therefore provides

APPENDIX B

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR JOSEPHINE COUNTY

DYLE LINN AND SHIRLEY LINN, Plaintiffs,

v.

ARNOLD A. AND CATHERINE L. PITTS,

Defendants.

Case No. 90-CV-0235.

JUDGMENT

This case came on regularly for trial on the 16th day of July, 1991, before the undersigned judge and a jury. Plaintiffs appeared by and through Michael Henderson, their attorney. Defendants appeared by and through Bernard S. Moore, their attorney.

The attorneys thereupon made opening statements on behalf of their respective clients. Plaintiffs then introduced testimony and other evidence in support of plaintiffs' case and thereafter rested.

At the close of plaintiffs' case, plaintiffs moved the court to voluntarily withdraw their claims for reckless infliction of severe emotional distress and intentional infliction of severe emotional distress. The court granted those motions. The defendants then made motions against plaintiffs' two remaining claims, pursuant to ORCP 60. Defendants motion directed against plaintiffs claim for nuisance was based upon ORS 30.930 and ORS 30.935. Defendants' motion directed against plaintiffs' claim for trespass was based upon plaintiffs' failure to prove their damages. The court granted both of defendants' motions. The Court then ordered that plaintiffs' claims be dismissed with prejudice.

Thereafter, defendants moved to voluntarily withdraw their first counterclaim for abuse of process and the Court granted that motion.

The matter now coming on for judgment upon the court's order as set forth above, it is hereby:

ORDERED AND ADJUDGED that the defendants have judgment against plaintiffs and that plaintiffs' action hereby is dismissed and that the defendants are granted judgment against plaintiff for defendants' costs and disbursements incurred herein, together with plaintiffs' reasonable attorney's fees.

MONEY JUDGMENT

1. Judgment creditors are Arnold A. and Catherine L. Pitts, Bernard S. Moore as their attorney of record.

2. Judgment debtors are Dyle and Shirley Linn.

3. Amount of judgment is costs and attorney's fees only, taxed in the amount

of $125.00 for costs and $4,000.00 for attorney's fees.

DATED this 28 day of Oct, 1991.

s/
Gerald C. Neufeld
District Judge

APPENDIX C

Filed: September 22, 1993

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

DYLE LINN and SHIRLEY LINN, Appellants,

v.

ARNOLD A. PITTS and CATHERINE L. PITTS,

Respondents.

(90-CV-0235; CA A72501)

Appeal from Circuit Court, Josephine County.

Gerald C. Neufeld, Judge.

Argued and submitted April 5, 1993.

Michael Henderson, Bend, argued the cause and filed the briefs for appellants.

Thomas F. Armosino, Medford, argued the cause for respondents. With him on the brief was Bernard S. Moore, Medford.

Before Deits, Presiding Judge, and Riggs and Durham, Judges.

DEITS, P.J.

Award of attorney fees under ORS 20.105(1) reversed and remanded; otherwise affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

[ ] No costs allowed.

[xx] Costs allowed, payable by: Respondents

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

MONEY JUDGMENT

Judgment #1

Creditor: _____

Debtor: _____

Costs:

Attorney fees: _____

TOTAL AMOUNT: $_____

Judgment #2

State of Oregon, Judicial Department

_____

Unpaid filing fee:

$ _____

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its

discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $_____.

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

Appellate Judgment Effective Date:

Court of Appeals (seal)

DEITS, P.J.

Plaintiffs brought this action for nuisance, arising out of farming activities on defendants' neighboring parcel. At the close of plaintiffs' case-in-chief, defendants moved to dismiss on the ground that they were immune from liability under ORS 30.930 to ORS 30.947. The trial court granted the motion, and

also assessed attorney fees against plaintiffs pursuant to ORS 20.105(1). Plaintiffs appeal from the resulting judgment. We affirm in part and reverse in part.

Plaintiffs only contention on the merits of the dismissal is that, in several respects, the immunity from nuisance liability that ORS 30.930 to ORS 30.947 confers on "farming practices" is unconstitutional. Defendants contend that plaintiffs cannot assert those arguments now, because the trial court struck their allegations of the putative constitutional deficiencies, and plaintiffs do not assign error to that ruling. However, the record indicates that the court in fact ruled on the constitutional issues, and also advised plaintiffs' counsel that he would have to make the constitutional arguments to the appellate court. Under the circumstances, we reach the merits of

plaintiffs' constitutional arguments, but reject them without discussion.

In their second assignment, plaintiffs argue that the court erred by awarding attorney fees, inter alia, because it made no findings to support their imposition. In Mattiza v. Foster, 311 Or 1, 10-11, 803 P2d 723 (1990), the court required findings to be made by a trial court in imposing attorney fees under ORS 20.104(1), in order to facilitate appellate review. See also Seeley v. Hanson, 317 Or 476, 484, __ P2d (1991). Defendants' reliance on Charlatan v. Lisle, 107 Or App 98, 811 P2d 642, rev den 312 Or 150 (1991), is apparently directed at the proposition that the appellate court may draw its own inferences in considering an award pursuant to ORS 20.105(1). That case is not on point, however, because there we assessed attorney fees on appeal and were

not reviewing a lower tribunal's award.

Under the circumstances of this case, we find that a remand for further proceeding on the attorney fee issue, rather than an outright reversal, is the appropriate disposition. See Mattiza v. Foster, supra, 311 Or at 11.

Award of Attorney fees under ORS 20.105(1) reversed and remanded; otherwise affirmed.

APPENDIX D

Filed: September 22, 1993

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

DYLE LINN and SHIRLEY LINN, Appellants,

v.

ARNOLD A. PITTS and CATHERINE L. PITTS,

Respondents.

(90-CV-0235; CA A72501)

Appeal from Circuit Court, Josephine County.

Gerald C. Neufeld, Judge.

Argued and submitted April 5, 1993.

Michael Henderson, Bend, argued the cause and filed the briefs for appellants.

Thomas F. Armosino, Medford, argued the cause for respondents. With him on the brief was Bernard S. Moore, Medford.

Before Deits, Presiding Judge, and Riggs and Durham, Judges.

DEITS, P.J.

Award of attorney fees under ORS 20.105(1) reversed and remanded; otherwise affirmed.

APPELLATE JUDGMENT

D-3

DESIGNATION OF PREVAILING PARTY

AND AWARD OF COSTS

Prevailing party: Appellants

[ ] No costs allowed.

[xx] Costs allowed, payable by:

Respondents

MONEY JUDGMENT

Judgment #1

Creditor: Dyle Linn and Shirley Linn

Debtor: Arnold A. Pitts and Catherine L. Pitts

Costs: $200.00

Attorney fees: $ -0-

TOTAL AMOUNT: $200.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment Court of Appeals

Effective Date: March 7, 1994 (seal)

APPENDIX E

IN THE SUPREME COURT

OF THE STATE OF OREGON

DYLE LINN, Appellant/Petitioner,

SHIRLEY LINN, Appellant/Petitioner,

v.

ARNOLD A. PITTS, Respondent/Respondent,

CATHERINE L. PITTS, Respondent/Respondent,

ORDER DENYING REVIEW

CA A72501

SC S40812

The Court has considered the petition for review and orders that it be denied.

DATE: February 1, 1994.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

UNIS, J., WOULD ALLOW

DURHAM, J., NOT PARTICIPATING

COPIES TO:

MICHAEL HENDERSON Attorney for Appellant/Petitioner

THOMAS F. ARMOSINO Attorney for Respondent/Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5b).

APPENDIX F

FARMING PRACTICES

30.930 Definitions for ORS 30.930 to 30.947. As used in ORS 30.930 to 39.947:

(1) "Farm" means any facility, including the land, building, watercourses and appurtenances thereto, used in the commercial production of crops, nursery stock, livestock, poultry, livestock products, poultry stock, poultry, livestock products, poultry products or the propagation and raising of nursery stock.

(2) "Farming practice" means a mode of operation on a farm that:

(a) Is or may be used on a farm of a similar nature;

(b) Is necessary for the operation of

the farm to obtain a profit in money; and

(c) Is or may become customarily utilized in conjunction with farm use.

30.935 Farming practice not private or public nuisance; effect on local ordinances; exceptions. (1) A farming practice shall not be declared or held to be a private or public nuisance.

(2) Any local government ordinance now in effect or subsequently adopted that makes a farming practice a nuisance or provides for its abatement as a nuisance shall not apply to that farming practice.

(3) The provisions of ORS 30.930 to 30.947 shall not apply:

(a) When a nuisance results from the negligent operation of a farming practice;

(b) To the growing or raising of infested, infected or diseased crops, poultry or livestock that are declared a nuisance by statute, ordinance or administrative rule of a governmental body that has jurisdiction over the farming practice; or

(c) To sounds produced by devices designed for agricultural purposes in order to frighten predacious birds or animals away from agricultural crops.

30.940 Effect on other remedies. The provisions of ORS 30.930 to 30.947 shall not impair the right of any person or governmental body to pursue any remedy authorized by a statute, ordinance or administrative rule that:

(1) Concerns matters other than a nuisance;

(2) Does not expressly purport to

prohibit or regulate a farming practice as a nuisance; or

(3) Prohibits or regulates the use or physical condition of facilities that adversely affect public health or safety, regardless of whether it purports to prohibit or regulate a situation as a nuisance.

30.945 Severability. It is the intent of the Legislative Assembly, in enacting ORS 30.870, 30.875 and 39.930 to 30.947, that each part of ORS 30.870, and 30.875 and 30.930 to 30.947 be considered to be essentially and inseparably connected with and dependent upon every other part. The Legislative Assembly does not intend that any part of ORS 30.870, 30.875 and 30.930 to 30.947 be the law if any other part is held unconstitutional.

30.947 Effect of siting of

destination resorts. The fact that a comprehensive plan and implementing ordinances allow the siting of destination resorts as provided in ORS 30.947, 197.435 to 197.465, 215.213 and 215.283, does not in any way affect the provisions of ORS 30.930 to 30.947.